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Pengarah Tanah dan Galian Selangor & Anor v PNSB Acmar Sdn Bhd & Anor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-01(A)-451–09 OF 2020 AND B-01(A)-470–09 OF 2020
HANIPAH FARIKULLAH, GUNALAN MUNIANDY AND AZIZUL AZMI ADNAN JJCA
19 NOVEMBER 2023

C

Land Law — Acquisition of land — Withdrawal from acquisition of land — High Court allowed judicial review application against withdrawal of compulsory acquisition — Whether there was actual occupation of land — Whether it was open to state authority to withdraw from compulsory acquisition — Whether applicable interest rate for calculation of late payment charges ought to be 8%pa or 5%pa — Whether Director General of Federal Land and Mines ought to be jointly liable with Klang land administrator and Director of Land and Mines of Selangor to pay compensation awarded and late payment charges imposed — Land Acquisition Act 1960 ss 18, 29 & 35

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PNSB Acmar Sdn Bhd ('PNSB Acmar') owned a piece of land in Klang. On 16 February 2017, it received notice prescribed under the Land Acquisition Act 1960 ('the Act') that 0.8401 hectares of its land was to be compulsorily acquired for the purposes of the construction of the LRT 3 project. The paymaster agency was Prasarana Malaysia Bhd. An enquiry was held and the amount of compensation awarded to PNSB Acmar was RM266,972,147. The relevant Form H was then issued. Later, the Prime Minister's department wrote to the Director General of Federal Land and Mines informing him that the subject land was surplus to requirements and that the Bandar Baru Klang station would now be constructed on lands already acquired. The Klang land administrator issued a notice of withdrawal from acquisition. The notice of withdrawal was subsequently published in the Selangor Government *Gazette*. An enquiry was subsequently held to ascertain the amount of compensation payable to PNSB Acmar for the withdrawal of the compulsory acquisition. The final amount of compensation was ascertained to be RM64,056,219. PNSB Acmar challenged the withdrawal of the compulsory acquisition through its judicial review application at the High Court. PNSB Acmar sought, among others, an order of certiorari quashing the decision of the Klang land administrator to withdraw the compulsory acquisition and a declaration that the withdrawal was null and void. The judicial review application was allowed by the High Court. In addition, the High Court made a finding of fact that the paymaster agency came into actual occupation of the subject land prior to the issuance of the Form K. Hence, these two appeals by: (a) the Director of Land

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and Mines of Selangor and the Klang land administrator in Appeal 451; and (b) the Director General of Federal Land and Mines in Appeal 470. The issues for determination were: (i) whether there was actual occupation of the subject land; (ii) whether it was open to the state authority to withdraw from the compulsory acquisition; (iii) whether the applicable interest rate for the calculation of late payment charges ought to be 8%pa as awarded by the High Court, or 5% pa as specified by the amendment to s 32(1) of the Act which took effect on 1 December 2017; and (iv) whether the Director General of Federal Land and Mines ought to be jointly liable with the Klang land administrator and the Director of Land and Mines of Selangor to pay the compensation awarded and late payment charges imposed.

Held, dismissing Appeal 451 and allowing Appeal 470:

(1) The averment that the agents of Prasarana Malaysia had only entered onto road reserve or government lands was inadmissible as hearsay and could not constitute a credible denial of the averments made by PNSB Acmar that were bolstered by the contemporaneous documents in the form of the police reports and photographs. PNSB Acmar had established that the paymaster agency or its employees and agents had entered into occupation of the subject land even before the issuance of Form H (see para 17).

(2) Section 18 of the Act did not seek to prescribe the time at which possession took place, but merely specified that possession may be taken by the state upon the issuance of the Form H or at any time thereafter. Possession could also be taken by being in actual physical possession of the land. Possession had been taken at the time of the issuance of Form H, but only because the paymaster agency was already in occupation of the subject land at that time. Summarily, the land administrator may take possession of the land once Form H had been issued. Exceptionally, the land administrator may, in urgent cases, took possession even before an award had been made, provided that the procedures set out in ss 19–21 of the Act were adhered to. Once Form K was issued and served, the land administrator was deemed to have taken possession of the subject land. If the land administrator or the paymaster agency or its employees or agents occupied and took actual possession of the land, possession would also have been taken for the purposes of s 35 of the Act. In either case, withdrawal from the acquisition would no longer be possible (see paras 27, 31 & 36–37).

(3) The applicable interest rate should still be that which prevailed prior to the publication of the acquisition in the Selangor Government *Gazette*. It could not be construed to have retrospective effect to take away a substantive right of the PNSB Acmar. Accordingly, because the applicable interest rate was 8% pa at the time the acquisition of the land

was published in the government *gazette* on 16 February 2017 (which was prior to the coming into force of the amendments to s 32 of the Act), the court below had not committed any appealable error in awarding interest on late payment charges at the rate of 8% pa. Therefore, the entirety of the appeal in Appeal 451 was dismissed (see paras 55–57).

(4) The Director General of Federal Land and Mines bore no liability for the payment of compensation under s 29 of the Act. For this reason, the appeal in Appeal 470 must be allowed (see para 61).

[Bahasa Malaysia summary

PNSB Acmar Sdn Bhd ('PNSB Acmar') memiliki sebidang tanah di Klang. Pada 16 Februari 2017, ia menerima notis yang ditetapkan di bawah Akta Pengambilan Tanah 1960 ('Akta') bahawa 0.8401 hektar tanahnya akan diambil secara wajib bagi tujuan pembinaan projek LRT 3. Agensi penggaji ialah Prasarana Malaysia Bhd. Satu siasatan telah diadakan dan jumlah pampasan yang diberikan kepada PNSB Acmar ialah RM266,972,147. Borang H yang berkaitan kemudiannya dikeluarkan. Kemudian, jabatan Perdana Menteri menulis surat kepada Ketua Pengarah Tanah dan Galian Persekutuan memaklumkan kepadanya bahawa tanah subjek adalah lebihan kepada keperluan dan stesen Bandar Baru Klang kini akan dibina di atas tanah yang telah diambil. Pentadbir tanah Klang mengeluarkan notis penarikan diri daripada pengambilan. Notis penarikan balik itu kemudiannya disiarkan dalam *Warta* Kerajaan Selangor. Siasatan kemudiannya diadakan untuk memastikan jumlah pampasan yang perlu dibayar kepada PNSB Acmar untuk penarikan pengambilan wajib. Jumlah terakhir pampasan dipastikan ialah RM64,056,219. PNSB Acmar mencabar penarikan balik pengambilan wajib itu melalui permohonan semakan kehakiman di Mahkamah Tinggi. PNSB Acmar memohon, antara lain, perintah certiorari membatalkan keputusan pentadbir tanah Klang untuk menarik balik pengambilan wajib dan pengisytiharan bahawa penarikan itu adalah terbatal dan tidak sah. Permohonan semakan kehakiman telah dibenarkan oleh Mahkamah Tinggi. Di samping itu, Mahkamah Tinggi membuat penemuan fakta bahawa agensi penggaji telah menduduki tanah subjek sebelum pengeluaran Borang K. Oleh itu, kedua-dua rayuan ini oleh: (a) Pengarah Tanah dan Galian Selangor dan pentadbir tanah Klang dalam Rayuan 451; dan (b) Ketua Pengarah Tanah dan Galian Persekutuan dalam Rayuan 470. Isu untuk penentuan adalah: (i) sama ada terdapat pendudukan sebenar tanah subjek; (ii) sama ada ia terbuka kepada Pihak Berkuasa Negeri untuk menarik diri daripada pengambilan wajib; (iii) sama ada kadar faedah terpakai untuk pengiraan caj pembayaran lewat sepatutnya 8% setahun seperti yang diberikan oleh Mahkamah Tinggi, atau 5% setahun seperti yang dinyatakan oleh pindaan kepada s 32(1) Akta yang mengambil berkuat kuasa pada 1 Disember 2017; dan (iv) sama ada Ketua Pengarah Tanah dan Galian Persekutuan patut bertanggungjawab bersama dengan pentadbir tanah Klang dan Pengarah Tanah dan Galian Selangor untuk

membayar pampasan yang diberikan dan caj pembayaran lewat yang dikenakan.

Diputuskan, menolak Rayuan 451 dan membenarkan Rayuan 470:

(1) Penegasan bahawa ejen-ejen Prasarana Malaysia hanya memasuki rizab jalan atau tanah kerajaan tidak boleh diterima sebagai dengar cakap dan tidak boleh menjadi penafian yang boleh dipercayai terhadap penegasan yang dibuat oleh PNSB Acmar yang disokong oleh dokumen-dokumen kontemporari dalam bentuk laporan polis dan gambar. PNSB Acmar telah membuktikan bahawa agensi penggaji atau pekerja dan ejennya telah memasuki pendudukan tanah subjek walaupun sebelum pengeluaran Borang H (lihat perenggan 17).

(2) Seksyen 18 Akta tidak bertujuan untuk menetapkan masa di mana pemilikan berlaku, tetapi hanya menyatakan bahawa pemilikan boleh diambil oleh negeri apabila Borang H dikeluarkan atau pada bila-bila masa selepas itu. Pemilikan juga boleh diambil dengan berada dalam pemilikan fizikal sebenar tanah tersebut. Pemilikan telah diambil pada masa pengeluaran Borang H, tetapi hanya kerana agensi penggaji telah pun menduduki tanah subjek pada masa itu. Secara ringkasnya, pentadbir tanah boleh mengambil alih tanah itu sebaik sahaja Borang H dikeluarkan. Secara luar biasa, pentadbir tanah boleh, dalam kes-kes yang segera, mengambil walaupun sebelum award dibuat, dengan syarat prosedur yang ditetapkan dalam ss 19–21 Akta dipatuhi. Setelah Borang K dikeluarkan dan dierahkan, pentadbir tanah dianggap telah mengambil alih tanah subjek. Jika pentadbir tanah atau agensi penggaji atau pekerja atau ejennya menduduki dan mengambil milikan sebenar tanah itu, pemilikan juga akan diambil untuk tujuan s 35 Akta. Dalam kedua-dua kes, penarikan daripada pengambilan tidak lagi boleh dilakukan (lihat perenggan 27, 31 & 36–37).

(3) Kadar faedah yang terpakai hendaklah tetap seperti yang diguna pakai sebelum penerbitan pengambilan dalam *Warta* Kerajaan Selangor. Ia tidak boleh ditafsirkan sebagai mempunyai kesan retrospektif untuk mengambil hak substantif PNSB Acmar. Sehubungan itu, oleh kerana kadar faedah yang dikenakan ialah 8% setahun pada masa pengambilan tanah itu diterbitkan dalam warta kerajaan pada 16 Februari 2017 (yang sebelum penguatkuasaan pindaan kepada s 32 Akta), mahkamah bawahan tidak melakukan sebarang kesilapan yang boleh dirayu dalam memberikan faedah ke atas caj pembayaran lewat pada kadar 8% setahun. Oleh itu, keseluruhan rayuan dalam Rayuan 451 telah ditolak (lihat perenggan 55–57).

(4) Ketua Pengarah Tanah dan Galian Persekutuan tidak menanggung liabiliti bagi pembayaran pampasan di bawah s 29 Akta. Atas sebab ini, rayuan dalam Rayuan 470 harus dibenarkan (lihat perenggan 60).]

Cases referred to

Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat [2021] 4 MLJ 1, FC (folld)
Dato Fong Chow & Ors v Pentadbir Tanah Daerah Jerantut & Anor [1988] 3 MLJ 325, HC (not folld)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)
Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35, SC (refd)
Fun Fatt (suing as the administrator to the estate of Lo Pang @ Fun Lim, deceased) v Kerajaan Malaysia & Anor [2020] 10 MLJ 1, HC (refd)
Hong Lee Trading & Construction Sdn Bhd v Taut Ying Realty Sdn Bhd [1991] 1 MLJ 250, HC (refd)
Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor [2015] 2 MLJ 126, CA (refd)
Ismail bin Bakar & Ors v Director of Lands and Mines, Kedah Darul Aman [2011] 5 MLJ 197, CA (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)
Wong Hong Toy & Anor v PP [1988] 2 MLJ 553 (refd)

Legislation referred to

Land Acquisition Act 1960 ss 18, 18(a), 19, 20, 21, 22, 29, 32, 32(1), (1C), 35, 35(1), 37, 37(1), 48, Forms D, H, K
Rules of Court 2012 O 41 r 5(1)
Rules of the Supreme Court 1970 [SG]

Appeal from: *PNSB Acmar Sdn Bhd v Pengarah Tanah dan Galian Selangor & Ors* [2020] MLJU 1561 (High Court, Shah Alam)

Goik Kenzu (with Nik Suhaimi, Goik Kenwayne and Christie Ling) (Goik, Ramesh & Loo) for PNSB Acmar Sdn Bhd.
Khairul Nizam bin Abu Bakar (with Husna bt Abdul Halim) (Assistant State Legal Advisors) for the Director of Land and Mines, Selangor and the Klang Land Administrator.
Noerazlim Saidil (with Natrah Mazman) (Attorney General's Chambers) for the Director General of Land and Mines of the federal government.

Azizul Azmi Adnan JCA (delivering judgment of the court):

INTRODUCTION

[1] There were two appeals before this court. They related to an application for judicial review made by the PNSB Acmar Sdn Bhd, the first respondent in both cases. At the High Court, PNSB Acmar successfully obtained an order

declaring (among others) that a notice of withdrawal of a compulsory acquisition of a portion of its land was null and void.

[2] The appellants in both the appeals before us sought to challenge the decision of the High Court. In Appeal No 451, the appellants were the Director of Land and Mines for the state of Selangor and the land administrator for the district of Klang. In Appeal No 471, the appellant was the Director General of the Department of Land and Mines of the federal government.

[3] We dismissed Appeal No 451 but allowed Appeal No 470. The reasons for our decision are set out here. This is the judgment of the court.

MATERIAL FACTS

Notice of compulsory acquisition

[4] PNSB Acmar owned a piece of land in Klang. On 16 February 2017, it received notice in Form D prescribed under the Land Acquisition Act 1960 that 0.8401 hectares of its land was to be compulsorily acquired for the purposes of the construction of the LRT 3 project, which is intended to connect Klang to the existing light rail network in Kuala Lumpur and Petaling Jaya. The paymaster agency was Prasarana Malaysia Bhd.

Enquiry and issuance of Form H

[5] An enquiry was held in accordance with the provisions of the Land Acquisition Act 1960 and the amount of compensation awarded to the first respondent was RM266,972,147. The relevant Form H was issued on 21 February 2018.

The notice of withdrawal

[6] On 3 July 2018, the Prime Minister's department wrote to the Director General of Land and Mines (the appellant in Appeal No 470), informing him that the subject land was surplus to requirements and that the Bandar Baru Klang station would now be constructed on lands already acquired. On 7 September 2018, the district land administrator of Klang issued a notice of withdrawal from acquisition in the prescribed form. The notice of withdrawal was subsequently published in the Selangor Government *Gazette* on 11 October 2018.

[7] Section 22 of the Land Acquisition Act 1960 provides for the taking of formal possession of acquired lands by the issuance and service of a notice in

Form K to the occupants and proprietor of such lands. It is not in dispute that the Form K was never issued in respect of the subject land.

Compensation for the withdrawal

[8] An enquiry was subsequently held to ascertain the amount of compensation payable to the first respondent for the withdrawal of the compulsory acquisition. The final amount of compensation was ascertained on 13 February 2019 to be RM64,056,219, which included the costs of repurchase of units on the land that had been sold, the costs of cancelling financing facilities and reputational damage suffered by the first respondent.

[9] This amount was paid to PNSB Acmar, and was received by it under protest.

At the High Court

[10] PNSB Acmar challenged the withdrawal of the compulsory acquisition through its judicial review application at the High Court. PNSB Acmar sought (among others) an order of certiorari quashing the decision of the Klang land administrator to withdraw the compulsory acquisition and a declaration that the withdrawal was null and void. In essence, PNSB Acmar sought to hold the authorities to their decision to compulsorily acquire the subject land, for which PNSB Acmar was to receive RM266,972,147 in compensation. By contrast, if the withdrawal was to take effect, PNSB Acmar would keep its land but would be entitled to RM64,056,219 as compensation.

[11] The judicial review application was allowed by the High Court.

Actual occupation of the subject land

[12] The High Court made a finding of fact that the paymaster agency came into actual occupation of the subject land prior to the issuance of the Form K. The learned judge hearing the matter referred to police reports that had been made by the representatives of PNSB Acmar, and dismissed the competing averments of the respondents as hearsay.

[13] The first respondent's application was supported by an affidavit affirmed by its general manager, Encik Muhammad Zali bin Md Shah. At para 15 of his affidavit-in-support, he stated that the paymaster agency or its agents had entered into occupation of the relevant portion of the subject land even before the Form H had been issued. Three police reports were exhibited (two of which were lodged prior to the issuance of the Form H), as well as

photographs of the subject land. It may also be observed that two of the police reports were lodged by En Muhammad Zali himself.

[14] Paragraph 15 of the affidavit-in-support is reproduced below:

> 15. Saya sesungguhnya ingin menyatakan bahawa Responden-Responden secara langsung dan/atau tidak langsung melalui agen-agenya, kontraktor-kontraktornya, pemilik projek LRT3, pekerja-pekerjanya dan hamba-hambanya telah memasuki dan menduduki Tanah terjadual tersebut dan telah mengambil milikan dari Pemohon. Saya ingin menyatakan bahawa beberapa laporan Polis telah dilaporkan yang bertarikh 27 November 2017, 30 January 2018 dan 25 April 2018 oleh Pemohon mengenai Responden-Responden dan/atau agen-agen dan kontraktor-kontraktornya mengambil milikan 'taken possession' Tanah terjadual tersebut. Terdapat juga bukti gambar-gambar yang menunjukan bahawa Responden-Responden dan/atau agen-agen dan kontraktor-kontraktornya telah menduduki dan mengambil milikan Tanah terjadual tersebut.

[15] An affidavit in opposition was affirmed by En Hasnan bin Hasbullah, whose title was 'Penolong Pegawai Tanah Lantikan Persekutuan'. In his affidavit, he denied the averments of En Muhammad Zali, and asserted that the land administrator for Klang had not given any permission to the paymaster agency to take possession of the land, and that he had been informed that agents of the paymaster agency had only entered onto those portions of the subject land that were either road reserve or that had become state land. The specific averment of En Hasnan was as follows:

> 18. Perenggan 15 Afidavit Sokongan Pemohon adalah dinafikan. Responden Kedua selanjutnya menyatakan bahawa Responden Kedua tidak pernah pada bila-bila masa menbenarkan agensi pemohon dan/atau agensi pembayar memasuki tanah terjadual. Tetapi Responden Kedua telah dimaklumkan bahawa agensi pemohon melalui wakilnya hanya memasuki tanah dibahagian yang telah menjadi rizab jalan dan/atau yang telah menjadi tanah kerajaan. Oleh itu, Pemohon diletakkan atas bebanan bagi membuktikan bahawa Responden Kedua telah membenarkan agensi pemohon dan/atau agensi pembayar memasuki tanah Pemohon.

[16] In a hearing on affidavits, if an assertion of fact is credibly disputed, the court must proceed to hear the case without taking into account the disputed facts: *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 (Privy Council). But an assertion should not merely be taken at face value. A court would still be entitled to reject an assertion of fact if it is inconsistent with the deponent's own averments (which is to say that it is self-contradictory), if it is vague or equivocal, if it is inconsistent with undisputed contemporaneous documentary evidence or if it is inherently implausible in and of itself: see the decision of the Judicial Committee of the Privy Council on appeal from Malaysia in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212. Where, however, a credible assertion of fact goes unchallenged, then the court must accept that assertion as

being representative of the truth: *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281. Under O 41 r 5(1) of the Rules of Court 2012, subject to certain exceptions (none of which apply in the present case), an affidavit may only contain such facts that the deponent is able of his own knowledge to prove. The equipollent provision in the Singapore Rules of the Supreme Court has been held in *Wong Hong Toy & Anor v Public Prosecutor* [1988] 2 MLJ 553 as enshrining the evidentiary rule against the admission of hearsay evidence in hearings conducted on the basis of affidavit evidence.

[17] We were therefore of the view that the averment by En Hasnan to the effect that the agents of Prasarana Malaysia had only entered onto road reserve or government lands was inadmissible as hearsay and could not constitute a credible denial of the averments made by En Mohammad Zali on behalf of PNSB Acmar. En Hasnan, by his own averment, did not have personal knowledge on whether or not the paymaster agency or its employees or agents had entered onto the subject land, and there was no affidavit affirmed by the representatives or agent of Prasana Malaysia. By contrast, En Mohammad Zali's averments were bolstered by the contemporaneous documents in the form of the police reports and photographs. For these reasons, we found that the first respondent has established that the paymaster agency or its employees and agents had entered into occupation of the subject land even before the issuance of the Form H on 21 February 2018.

ISSUES

[18] The key issue before the court was whether it was open to the state authority to withdraw from the compulsory acquisition in the circumstances of the case. Under s 35 of the Land Acquisition Act 1960, it may do so where possession of the land has not been taken.

[19] The High Court held that possession in this case had taken place upon the issuance and service of Form H on 21 February 2018 and found support for this conclusion in three cases: *Dato Fong Chow & Ors v Pentadbir Tanah Daerah Jerantut & Anor* [1988] 3 MLJ 325, *Hong Lee Trading & Construction Sdn Bhd v Taut Ying Realty Sdn Bhd* [1991] 1 MLJ 250 and *Fun Fatt (suing as the administrator to the estate of Lo Pang @ Fun Lim, deceased) v Kerajaan Malaysia & Anor* [2020] 10 MLJ 1.

[20] A number of different grounds of appeal were raised by the appellants, but we were of the view that the grounds of appeal may be distilled into the following issues:

(a) whether the time at which possession of the land is regarded for the purposes of s 35 as having been taken is;

(b) whether the applicable interest rate for the calculation of late payment charges ought to be 8% pa as awarded by the High Court, or 5% pa as specified by the amendment to s 32(1) of the Land Acquisition Act 1960 which took effect on 1 December 2017; and

(c) whether the Director General of the Federal Department of Land and Mines (the appellant in Appeal 470) ought to be jointly liable with the land administrator for Klang and the State Director of the Department of Land and Mines to pay the compensation awarded and late payment charges imposed. It was advanced for the appellant in Appeal No 470 that the obligation to make the payment of compensation lay with the land administrator appointed under state land law, and not the Federal Department of Land and Mines.

[21] The appellants have also mounted a challenge on the finding of fact by the High Court that actual possession of the subject land had been taken by the paymaster agency or its agents. We have already addressed this ground of appeal at paras [13]–[18], ante.

ANALYSIS AND DECISION

Summary

[22] Our findings in this case are summarised as follows:

(a) s 18 of the Land Acquisition Act 1960 does not seek to prescribe the time at which possession takes place, but merely specifies that possession may be taken by the state upon the issuance of the Form H or at any time thereafter. It is an empowering or enabling provision, which grants the right to the land administrator to take possession of the land after issuance and service of Form H, but is not a deeming provision specifying the legal presumption of possession;

(b) s 22 provides for a presumption of law that, once Form K has been issued by the land administrator, it is deemed to have taken formal possession of the subject land;

(c) however, possession can also be taken by being in actual physical possession of the land;

(d) on a proper construction of s 35 of the Land Acquisition Act 1960, once the earlier of the following occurs:

(i) actual physical possession of the land is taken; or

(ii) the Form K is issued,

the compulsory acquisition can no longer be withdrawn;

(e) on the facts of the présent case, the paymaster agency had entered into occupation of the subject lands even before the Form H had been issued. This amounted to trespass, for as long as the Form H had not yet been issued. Once the Form H was issued and the agency continued in occupation of the subject land, then actual physical possession will have been acquired at that point by or on behalf of the state;

(f) as regards the payment of late payment charges, because the applicable interest rate was 8% pa at the time of the issuance of the Form D declaring that the first respondent's land was required for the LRT3 project, the court below was entirely correct to award interest at the rate of 8% pa; and

(g) the obligation to pay compensation lies with the land administrator of the state, and not with the Director General of the Department of Land and Mines. For this reason, the appeal in Appeal 470 was allowed.

[23] The analyses underlying the findings in the preceding paragraphs are set out below.

The meaning of possession

[24] Section 35 of the Land Acquisition Act 1960 governs the manner in which a withdrawal from an acquisition may be undertaken. Subsection (1) sets out the main operative provision. It reads as follows:

> Section 35 Withdrawal from acquisition
>
> (1) The State Authority shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

[25] By the terms of s 35(1), withdrawal may only be possible where possession of the land in question has not yet been taken. The key and determinative question is the meaning of 'possession' as used in s 35(1).

[26] Section 18 of the Land Acquisition Act 1960 permits the land administrator to take possession of the land acquired upon the issuance and service of Form H. Section 18 provides as follows:

> Section 18 General power to take possession
>
> The Land Administrator may take possession —
>
> (a) of any land in respect of which an award has been made under section 14, such possession being taken at the time of the service upon the occupier of such land of a notice in Form H, or at any time thereafter;
>
> (b) of any land specified in a Certificate of Urgency issued under section 19, whether or not any award has been made in respect of such land:

Provided that the Land Administrator shall not take possession of any part of any land under paragraph (b) which is occupied by any building, except in accordance with section 20.

[27] In our considered view, s 18 of the Land Acquisition Act 1960 does not seek to prescribe the time at which possession takes place, but merely specifies that possession may be taken by the State upon the issuance of the Form H or at any time thereafter. It is an empowering or enabling provision, which grants the right to the land administrator to take possession of the land after issuance and service of Form H. From a plain reading of s 18, it is clear that it anticipates a further act being carried out by the land administrator in order for possession to be taken. The words 'at any time thereafter' at the end of para (a) further supports the construction that s 18 is not a deeming provision specifying the legal presumption of possession. If s 18 was intended to create a legal presumption of possession, then the Legislature would have fixed a point in time for possession to take effect, rather than using the form of words in para (a). Quite clearly, in our view, something more must be done by the land administrator before it is deemed to have taken possession of the land in question.

[28] That something more is that which is specified in s 22.

[29] Section 22 provides for a presumption of law that, once Form K has been issued by the land administrator, it is deemed to have taken formal possession of the subject land.

[30] Section 22 provides as follows:

Section 22 Formal possession

(1) The Land Administrator shall take formal possession of any scheduled land by serving upon the occupier thereof or, if he cannot be found, by posting thereon, a notice in Form K.

(2) A copy of the list of lands gazetted under subsection 8(1), or any relevant part thereof, shall be included as a schedule to the notice in Form K.

(3) Upon taking possession of land under subsection (1) the Land Administrator shall also serve a copy of the notice in Form K upon —

(a) the registered proprietor of the land, where he is not the occupier;

(b) the proper registering authority, where he is not the Land Administrator himself; and

(c) the statutory body, person or corporation referred to in paragraph 23(a), and the management corporation in respect of a subdivided building or land.

[31] In our considered view, possession can also be taken by being in actual physical possession of the land. On a proper construction of s 35 of the Land Acquisition Act 1960, once actual possession of the land is taken, the compulsory acquisition can no longer be withdrawn. This construction is supported by the fact that s 35 refers to 'possession' and not 'formal possession'.

[32] It is a well-established principle of statutory construction that the provisions of written law must be read in a cohesive manner and the courts are bound to give meaning to the words used in the statute and cannot treat such words as mere tautology or surplusage. In the case of *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, the Supreme Court had held as follows:

> On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. In *Quebec Railway, Light, Heat and Power Co Ltd v Vandry* [1920] AC 662, Lord Sumner in delivering the judgment of the Judicial Committee said (at p 676):
>
> > Secondly, there is no reason why the usual rule should not apply to this as to other statutes — namely, that effect must be given, if possible, to all the words used for the Legislature is deemed not to waste its words or to say anything in vain.

[33] The word 'possession' in s 35 must therefore carry a meaning different from 'formal possession'. The logical conclusion must be that 'possession' encompasses something wider than 'formal possession'; the latter term is merely a subset of 'possession', and possession can be obtained by being in actual occupation of the land in question.

[34] This construction commends itself to logic and common sense, as it would reduce the likelihood of an intentional delay in the issuance of the Form K.

[35] On the facts of the present case, we are satisfied that the applicant (PNSB Acmar) has established that the paymaster agency had entered into occupation of the subject lands even before the Form H had been issued. This amounted to trespass, for as long as the Form H had not yet been issued. This is because possession can only be taken at the earliest, upon the issuance of the Form H. Once the Form H is issued and the agency continues in occupation of the subject land, then actual possession will have been acquired at that point by or on behalf of the state.

[36] We are thus in agreement with the conclusion of the High Court, albeit for different reasons. On the facts of the present case, possession has been taken at the time of the issuance of the Form H, but only because the paymaster agency was already in occupation of the subject land at that time.

[37] The applicable principles may be summed up as follows: The land administrator may take possession of the land once the Form H has been issued. Exceptionally, the land administrator may, in urgent cases, take possession even before an award has been made, provided that the procedures set out in ss 19–21 are adhered to. Once the Form K is issued and served, the land administrator is deemed to have taken possession of the subject land. If the land administrator or the paymaster agency or its employees or agents occupy and take actual possession of the land, possession will also have been taken for the purposes of s 35. In either case, withdrawal from the acquisition will no longer be possible.

[38] In the following paragraphs, we address specific points raised in the submissions of counsel to the extent that they have not been answered in the preceding paragraphs.

[39] Learned counsel for the appellants in Appeal No 451 cited the case of *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126 in support of the proposition that possession is only regarded to have been taken with the issuance of the Form K. In that case, a piece of land in the district of Gombak had been compulsorily acquired for the construction of a military college. Compensation had been paid to the proprietor at the time, and following the issuance of the Form K, the land was realienated to the federal lands commissioner. Despite this, the registered proprietor was able to transfer the land to the appellant's father, who then transferred the land to the appellant.

[40] The Court of Appeal held that the acquisition of the land had been completed by the issuance of the Form K, and as a consequence, the subsequent transfer by the previous registered proprietor to the appellant's father was of no consequence or effect. This case did not deal with a withdrawal from an acquisition, but the Court of Appeal referred to s 35 in support of the conclusion that the acquisition was completed at the point of the issuance of the Form K. Mah Weng Kwai JCA stated in that case:

> [46] Essentially, what s 35 of the Act means is that once possession of the land has been taken the acquisition process is complete and it will be too late for the state authority to withdraw from the acquisition. The acquisition process is deemed ended and final and the state authority cannot resile from its position. Likewise in this case, once Borang K had been issued giving notice that possession has been formally taken of the land under s 22 of the Act it signalled the completion of the

A acquisition process and that the ownership of the land by the proprietor at the material time had terminated. The completion of the acquisition process did not depend on the endorsement of a memorial on the title.

B **[41]** We are of the view that the conclusion of the Court of Appeal in *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* is not inconsistent with our finding in the present case. It will be observed that *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* was not a case dealing with actual physical occupation or possession of the land. Furthermore, the Court of Appeal in that case did not rule that the C issuance of Form K was the only way in which possession could be taken for the purposes of a compulsory acquisition.

[42] Learned counsel for the appellants in Appeal No 451 further relied on D the Federal Court case of *Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat* [2021] 4 MLJ 1 in support for his contention that possession for the purposes of s 35 means formal possession consequent upon the issuance of the Form K. That case involved the compulsory acquisition of land belonging to the appellant for E the construction of the SILK expressway in Kajang. We were of the view that this case did not assist the appellants, for the following reasons:

(a) first, the finding of the Federal Court that possession took effect from the issuance of Form K was in the context of the calculation of late F payment charges on the excess sum awarded by the court pursuant to s 48 of the Land Acquisition Act 1960, and not in the context of a withdrawal under s 35;

(b) second, the finding of the Federal Court that interest ran for the purposes of the calculation of late payment charges for the excess sum G from the date of the issuance of the Form K turned upon the express words used in s 48, which referred to 'the date on which *the Land Administrator took possession* of the land'. The Federal Court explained in this context:

H > [Section] 48 clearly stipulates that the computation of the late payment charges runs from the date on which the LA took possession of the land. Notwithstanding the fact that SILK took possession of the subject lands much earlier, we are of the view that the words of s 48 are clear and unequivocal; as such, taken in its natural and ordinary meaning, it means I what it says — that the computation starts from the date the LA took possession of the land. It can import of no other interpretation.
>
> By contrast, there is no such reference to the land administrator taking possession in s 35; and

(c) thirdly and perhaps most significantly, the Federal Court found that, in the context of late payment charges payable on the compensation awarded by the land administrator under s 32 of the Land Acquisition Act 1960, the late payment charges would commence on the date on which physical possession of the subject land had been taken by the paymaster agency. The reason was that the definition of 'due date' in s 32(1C) made no reference to the land administrator taking possession. The Federal Court explained:

> We observe that the meaning ascribed to the words 'due date' are explicitly defined for s 32 only. It envisages two alternative situations — (a) the date of taking possession; and (b) a date three months after the service of the land administrator's award in Form H. We do not think that it can be interpreted to mean that the 'due date' refers to the date of formal possession of the land after issuance of the notice in Form K as contended by the respondent; we say this because there is no stipulation to say that the taking of possession must be by the land administrator. Therefore, on the facts and on the law, such an interpretation cannot stand against the clear wordings of sub-s (1C). As such, we are in agreement with the appellants that for the purposes of computation of late payment charges under s 32, the phrase 'taking possession of the land' in sub-s (1C) means taking physical possession of the land by SILK.
>
> Accordingly, far from supporting the contentions of the appellant, *Amitabha Guha* fortifies our conclusion that s 35 of the Land Acquisition Act 1960 — which like s 32 does not contain a reference to the land administrator taking possession — prevents a withdrawal once either formal or physical possession has been taken.

[43] Learned counsel for the appellant also referred to the proceedings in parliament as recorded by *Hansard*, specifically to the speech of the Minister of Natural Resources and Environment during the debate to approve the Land Acquisition (Amendment) Act 2016. The minister said, in relation to the amendment to s 35:

> Seksyen 35 akta ini dicadang dipinda bagi memperkemaskan prosedur berhubung penarikan balik pengambilan tanah sekiranya penarikan balik hendak dibuat sebelum pemilikan formal dilaksanakan.

[44] Counsel for the appellants argued that the proceedings of *Hansard* thus showed that parliament had intended only for formal possession to operate as a bar to withdrawal.

[45] In our judgment, the proceedings of *Hansard* cannot override the express words of the statute. Had parliament intended for withdrawal to be prohibited only in the circumstances where formal possession has been taken by the issuance of the Form K, then it would have said so.

[46] In the following paragraphs, we address the arguments advanced on behalf of the first respondent in support of the proposition that possession is taken when the Form H is issued. As explained earlier, in our judgment, the issuance of Form H does not itself constitute the taking of possession of the acquired land, but merely triggers the right of the land administrator to take possession. Both the first respondent and the court below referred to three cases on this point. We examine these in turn.

[47] The High Court case of *Dato Fong Chow & Ors v Pentadbir Tanah Daerah Jerantut & Anor* [1988] 3 MLJ 325 is not authority for the proposition that possession is deemed to have been taken upon the issuance of the Form H. In that case, the plaintiff sought an order of court (among others) to compel the land administrator to pay the compensation sum. The court granted the order but ordered for interest to run only from the date of judgment. The court found that possession had not been taken, despite the fact that the Form H had been issued more than four years prior to the suit. In any event, *Dato Fong Chow* has been overruled by the Court of Appeal in *Ismail bin Bakar & Ors v Director of Lands and Mines, Kedah Darul Aman* [2011] 5 MLJ 197, and hence reliance ought only to be placed on the former case with the utmost care.

[48] In the case of *Hong Lee Trading & Construction Sdn Bhd v Taut Ying Realty Sdn Bhd* [1991] 1 MLJ 250, the issue was when an acquisition is deemed to have taken place, which affected the apportionment of compensation between the lessee and proprietor of the land in question. It may thus be observed that this case did not involve the land administrator at all. The court held that the land in question was acquired when the memorial was entered onto the register document of title pursuant to s 23 of the Land Acquisition Act 1960 (which can only take place following the issuance of the Form K). It is clear that this case was concerned with the proper construction of the lease agreement entered between the parties, and not when an acquisition may be withdrawn under s 35.

[49] The final case relied upon by the first respondent was *Fun Fatt (suing as the administrator to the estate of Lo Pang @ Fun Lim, deceased) v Kerajaan Malaysia & Anor* [2020] 10 MLJ 1. Like the present case, the applicant in that case sought (among others) an order of certiorari to quash the decision of the government to withdraw from a compulsory acquisition. In that case, the government began the acquisition process over land belonging to an estate of which the applicant was administrator. The land was to be acquired for the purposes of the construction of the Setiawangsa-Pantai Expressway (SPE). The Form H was issued on 9 October 2017. The evidence showed that actual physical possession of the land had been taken by the Datuk Bandar Kuala Lumpur and the contractor appointed to undertake construction of the SPE sometime within a period one year after the issuance of the Form H. The Form

K was never issued and the government purported to exercise the right to withdraw from the acquisition. A

[50] The High Court allowed the application for judicial review and quashed the decision of the government to withdraw from the acquisition, holding as follows: B

> [17] Based on the authorities above, the facts showed that a notice of the award in Form H dated 9 October 2017 pursuant to s16 of the Act was served on the applicant on the same day. By plain reading of s 18(a) of the Act, the second respondent had taken possession of the said land upon service of Form H. C

[51] We were unable to agree with this particular conclusion, because s 18(a) of the Land Acquisition Act 1960 does not, upon its proper construction, provide that possession is to be regarded as having been taken with the issuance of the Form H. As explained, the issuance of Form H merely operates as a trigger for the right of the land administrator to take occupation or possession of the land. Nonetheless, in that case, because actual physical possession had in fact been taken sometime prior to 10 October 2018 (see para 18 of the judgment in that case), it follows that the court ultimately came to the correct decision that withdrawal was no longer possible. The government could not rely on its own failure to issue the Form K to justify withdrawing from the acquisition. D E

The applicable rate for late payment charges F

[52] The High Court had allowed interest on the late payment charges at a rate of 8% pa. The appellants argued that the applicable rate should have been 5% pa.

[53] The applicable interest rate for late payment charges under s 32 of the Land Acquisition Act 1960 had been amended from 8% pa to 5% pa by the Land Acquisition (Amendment) Act 2016. This Amendment Act came into force on 1 December 2017. The Form D declaring that the first respondent's land was required for the LRT3 project in this case had been issued and published in the Selangor Government *Gazette* on 16 February 2017. It may be observed that the amendments to section 32 had already come into force by the time the High Court pronounced the order in favour of the first respondent. G H

[54] The starting point in the analysis of this issue must start with the Amendment Act itself, which contains a saving and transitional provision. This provision reads as follows: I

> 43. All proceedings, actions or other matters required to be done under section 3F and 28, subsections 37(2) and (3) of the principal Act which are still pending or if

already in progress, immediately before the coming into operation of this Act, shall be continued or concluded as if the principal Act had not been amended by this Act.

[55] The present appeal was not one that arose from an application under s 37, and thus would have been not be expressly saved by the transitional provision in s 43 of the Land Acquisition (Amendment) Act 2016. Be that as it may, we are of the view that the applicable interest rate should still be that which prevailed prior to the publication of the acquisition in the Selangor Government *Gazette*. The reason is that, based on the proper construction of the Amendment Act, it cannot be construed to have retrospective effect to take away a substantive right of the first respondent. This precise point was considered by the Federal Court in *Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat* [2021] 4 MLJ 1. That case involved an application under s 37(1) of the Land Acquisition Act 1960, which had been made prior to the coming into force of the amendments to the principal Act, and which the Court of Appeal held was not subject to the saving and transitional provision in s 43 of the Amendment Act. The Federal Court overturned the decision of the Court of Appeal, holding that the applicable rate was 8% pa and not 5%, because of the principle that the courts should favour a construction that does not give retrospective effect to provisions of law that remove substantive rights. The Federal Court stated as follows:

> The right to late payment charges is in the nature of a substantive right, particularly so in the case of late payment charges under s 32. As a general rule, statutory amendments that affect substantive rights do not operate retrospectively. First, the 2016 Amending Act did not expressly exclude the application of s 30(1)(b) of the Interpretation Acts which provides that the repeal of a written law in whole or in part shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law. The Privy Council also expressed the view that '[a]part from the Interpretation Statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used' (see *Yew Bon Tew* at p 2). That a retrospective operation should not be given to a statute to impair an existing right and that one should avoid a construction that inflicts a detriment was emphasized by the then Supreme Court in *National Land Finance Co-Operative Society Limited,* at p 106 (see also *Society of La Salle Brothers* at paras [43]–[45]; *Tenaga Nasional Bhd v Kamarstone,* at paras [6]–[7]). [68] It must be borne in mind that the LAA 1960 is a special enactment dealing with the fundamental right to property under art 13 of the Federal Constitution. As a general rule, such statutes should be construed strictly and any doubt should be resolved in favour of the landowner so as to give meaning to the constitutional protection of a person's right to his property (*Ee Chong Pang* at para [21]; *Sistem Lingkaran Lebuhraya Kajang Sdn Bhd* at para [4]).

[56] We are of the view that the same reasoning would apply to facts of the present case. Accordingly, because the applicable interest rate was 8% pa at the time the acquisition of the land was published in the government *gazette* on 16 February 2017 (which was prior to the coming into force of the amendments to s 32), the court below had not committed any appealable error in awarding interest on late payment charges at the rate of 8% pa.

[57] For the reasons explained above, the entirety of the appeal in Appeal No 451 by the Klang district land administrator and by the Director of the Department of Land and Mines was dismissed with costs of RM10,000, such costs to be subject to an allocatur.

The liability of the Director General

[58] The final point of appeal relates to the liability of the federal government. The High Court had granted reliefs against all the respondents in the action, which included the Director General of the Federal Department of Land and Mines.

[59] Under s 29 of the Land Acquisition Act 1960, the obligation to pay compensation lies with the land administrator. The expression 'land administrator' is defined under the Act in the following terms:

> 'Land Administrator' means any Land Administrator or other officer appointed under the State land law, and includes an Assistant Land Administrator;

[60] Accordingly, the Director General of the Federal Department of Land and Mines bore no liability for the payment of compensation under s 29. For this reason, we were of the view that the appeal in Appeal 470 must be allowed. We allowed costs of RM5,000.

Appeal 451 dismissed and Appeal 470 allowed.

Reported by Nabilah Syahida Abdullah Salleh